

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)	
)	
vs.)	Criminal No. 05-243
)	
CHARRON MIYARES,)	
)	
Defendant.)	

O R D E R

AND NOW, this 7th day of December, 2005, upon consideration of Defendant's pro se Motion for New Trial Pursuant to Fed. R. Crim. Proc. 33 and Motion to Vacate and Set Aside Jury Verdict Based on Ineffective Assistance of Counsel (document No. 34) filed in the above-captioned matter on November 14, 2005, and upon further consideration of the Government's Response thereto,

IT IS HEREBY ORDERED that said Motion is DENIED as follows. To the extent that Defendant's Motion seeks a new trial pursuant to Federal Rule of Criminal Procedure 33, it is denied with prejudice. In so holding, the Court notes that Defendant himself states, in his Motion, that he is not asking for a new trial, but rather, to have the jury verdict vacated and set aside so that he can resolve his case by plea. Moreover, he states that a new trial would not remedy the constitutional violations he has allegedly suffered as a result of the alleged ineffective assistance of counsel.

To the extent that Defendant's Motion seeks to set aside the jury verdict in this case pursuant to 28 U.S.C. § 2255, his Motion is premature. A Section 2255 petition can only be filed by a prisoner "in custody under sentence" once the Defendant's conviction and sentence are final. See 28 U.S.C. § 2255; Kapral v. United States, 166 F.3d 565, 569-71 (3d Cir. 1999). Since Defendant has yet to be sentenced in this case, and since his right to appeal has not yet matured, his conviction and sentence are not yet final. Therefore, Defendant's Motion, to the extent that it seeks relief pursuant to Section 2255, is denied without prejudice to Defendant's right to seek Section 2255 relief after his conviction and sentence become final.

S/Alan N. Bloch
United States District Judge

cc/ecf: Asst. U.S. Atty. Soo Song
Jack Conflenti, Esquire
Martin Dietz, Esquire